

**MEMORANDUM OF AGREEMENT
BY AND BETWEEN**
THE OKLAHOMA SECRETARY OF ENERGY AND ENVIRONMENT,
THE OKLAHOMA SECRETARY OF AGRICULTURE,
THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY,
AND
THE ARKANSAS NATURAL RESOURCES COMMISSION,
OR SUCCESSOR AGENCIES

**Article I
BACKGROUND**

- (1) WHEREAS, the States of Arkansas and Oklahoma (“States”) share a common goal of further improving and protecting water quality in the Illinois River Watershed (“Watershed”), particularly the portions designated as Oklahoma Scenic Rivers and Lake Tenkiller;
- (2) WHEREAS, on December 18, 2003, the States entered into a Statement of Joint Principles and Action (“First Statement”) in an effort to avoid costly, protracted litigation and administrative proceedings that would strain relationships between the States and distract from cooperative efforts needed to protect and improve water quality in the designated Scenic Rivers;
- (3) WHEREAS, under the First Statement, the States agreed to undertake interim actions designed to improve river clarity and substrate quality in the designated Scenic Rivers and their watersheds, including substantial upgrades to wastewater treatment plants, efforts by industry to remove nutrients out of the watersheds, and the development and implementation of regulations restricting the use of nutrients to fertilize lands within the watersheds;
- (4) WHEREAS, on February 20, 2013, the States entered into a Second Statement of Joint Principles and Actions (“Second Statement”) intended to extend and augment the First Statement;
- (5) WHEREAS, under the Second Statement, the States agreed to appoint a six (6) member Joint Study Committee to undertake a study that resulted in specific recommendations as to what phosphorus levels and what frequency and duration components of measure are necessary to protect the aesthetics beneficial use and scenic river designation (Outstanding Resource Water) assigned to the designated Scenic Rivers, and based on overall stream health that included evaluating the relationship, if any, between phosphorus concentrations in the designated Scenic Rivers and biotic indicators of water quality, including primarily algal taxonomic composition and periphyton biomass;
- (6) WHEREAS, under the Second Statement, “[t]he States of Arkansas and Oklahoma, acting through their respective Parties, agree[d] to be bound by the findings of the Joint Study. Oklahoma, through the Oklahoma Water Resources Board, agree[d] to promulgate any new Numeric Phosphorus Criterion, subject to applicable Oklahoma statutes, rules and regulations if significantly different than the current 0.037 mg/L standard” and “Arkansas agree[d] to be bound by and to fully comply with the Numeric Phosphorus Criterion at the Arkansas-Oklahoma State

line, whether the existing 0.037 mg/L standard is confirmed or a new Numeric Phosphorus Criterion is promulgated”;

(7) WHEREAS, on December 19, 2016, the Joint Study Committee approved and issued a Final Report to Governors from the Joint Study Committee and Scientific Professionals (Joint Study Recommendations) and specifically recommended “a six-month average total phosphorus level of not to exceed 0.035 milligrams per liter based on water samples collected during critical conditions was necessary to protect the designated Scenic Rivers”;

(8) WHEREAS, the Joint Study Committee also unanimously recommended that both States develop monitoring and assessment programs informed by the Joint Study Recommendations and other scientific information to determine attainment of the total phosphorus criterion;

(9) WHEREAS, the Joint Study Committee also unanimously recommended “that protection of the [Oklahoma] Scenic Rivers needs to extend beyond the phosphorus levels and additionally focus on including but limited to the following: Hydrologic alteration; Riparian zone protection; Stream bank stabilization; Fluvial channel habitat; In-stream mining; [a]nd other contaminants”;

(10) WHEREAS, “the Joint Study Committee unanimously views system wide management as critical to the protection of the [Oklahoma] Scenic Rivers”;

(12) WHEREAS, the EPA has developed models for the Illinois River and Lake Tenkiller that can be used by all parties in evaluating future improvements to the Watershed;

(13) WHEREAS, while much progress has been made and improvements continue, the historical uses of the Watershed and Lake Tenkiller mean that it will take extensive cooperative actions to achieve the common goals of protection and enhancement of water quality;

(14) WHEREAS, it is the belief of the States that it is in their best interest to continue working together to protect and improve water quality in the designated Scenic Rivers and to avoid costly, protracted litigation and administrative proceedings;

Article II AGREEMENT

NOW THEREFORE, the Arkansas Department of Environmental Quality (ADEQ), the Arkansas Natural Resources Commission (ANRC), the Oklahoma Secretary of Agriculture, and the Oklahoma Secretary of Energy and Environment, or successor agencies (Parties), enter into this Memorandum of Agreement for the implementation of the Joint Study Recommendations and agree to the following commitments:

(1) Joint Study Committee Total Phosphorus Criterion Recommendation—The States hereby acknowledge and accept that the existing Oklahoma numeric value of 0.037 mg/L will remain as the total phosphorus criterion magnitude at the state line;

(2) Promulgation of Criterion Duration and Frequency—The Oklahoma Water Resources Board (OWRB) agrees to initiate rulemaking in Oklahoma Administrative Code (OAC), Chapters 45 and 46, to implement the Joint Study Recommendations as they apply to the total phosphorus criterion, subject to applicable laws, rules, and regulations. Any revisions shall be scientifically defensible and ensure full protection of beneficial uses and the Scenic River and Outstanding Resource Water status of the Illinois River. The OWRB agrees to submit revised Water Quality Standards and Water Quality Standards Implementation found in OAC, Chapters 45 and 46, to the Oklahoma Governor for approval during the 2019 Oklahoma legislative session;

(3) Processing and Issuance of Permit Applications for Facilities with a Design Flow of Greater than One (1) Million Gallons per Day (MGD)—The States, through the appropriate Parties, will continue to require existing point-source dischargers in the Illinois River Watershed with a design capacity of greater than 1 MGD to operate under existing NPDES permits reflecting an effluent limit for total phosphorus of not more than 1 mg/L based upon a 30-day average or as may be allowed pursuant to 40 CFR 122.44(l)(1). In considering applications to renew, amend, or modify existing NPDES permits or to issue permits for new point-source discharges, the Parties agree to the following:

(A) Permit Renewal: The States may issue permit renewals for existing NPDES permits consistent with Art. II (3). The total phosphorus loading will not be increased beyond the permitted design flow, and the renewal will include a permit condition requiring an analysis of potential phosphorus concentration reduction be completed during the term of the renewed permit.

(B) Amending or Modifying Permits of Existing Point-Source Discharges: The total phosphorus loading will not be increased beyond the permitted design flow, and where appropriate, the applications will be evaluated for the ability to meet an agreed-to total phosphorus limit of not more than 0.5 mg/L on an averaging period determined by the permitting authority or as may be allowed pursuant to 40 CFR 122.44(l)(1).

(C) Permitting New Point Source Discharges: In considering applications for new point-source discharges, the applications will be evaluated for the ability to meet an agreed to

total phosphorus limit of not more than 0.2 mg/L on an averaging period determined by the permitting authority.

(D) Applicability of Variance Provisions: The Parties will consider applications in light of these agreed-to limits until such time as the OWRB has finalized applicable variance requirements and/or the revisions to the Oklahoma Water Quality Standards and Water Quality Standards Implementation required in Article II (2) above, subject to applicable laws, rules, and regulations.

(E) Applicability of Trading Programs or Watershed Based Permits: New, modified, and existing point source discharges that are permitted under Article II (3) shall be eligible to receive credit in any nutrient trading program (future or potential) for any decrease in total phosphorus loading in the Watershed that occurs as a result of permitting pursuant to this Agreement. Nothing in this paragraph creates any guaranty, right, or claim in accordance with Article IV of this agreement.

(4) Regulatory Flexibility—The States acknowledge that there may be different short- and long-term approaches to address point sources covered by Article II (3) of this Agreement that can continue to reduce the phosphorus loading. These approaches may include but are not limited to options such as the enactment of a nutrient water-quality standard variance, permitting variances, nutrient trading programs, and watershed-based permits. Nothing in this Agreement is intended to limit the authorities of the Parties to implement these approaches and strategies to the fullest extent possible;

(5) Monitoring and Assessment—Within one (1) year of the effective date of this Agreement, the States agree to work together to develop and initiate a Monitoring and Assessment Workgroup (MAW) jointly chaired by representatives from OWRB and ADEQ, or successor agencies, with membership as determined by the chairs. The MAW will develop a robust, basin-wide monitoring and assessment program designed to ascertain progress toward attainment of the total phosphorus criterion as defined by Article II (1) and (2) and to be used in 305(b) and 303(d) reports for the States. Additional participants may be invited to participate in MAW meetings or discussions at the discretion of the chairs;

(6) Watershed Improvement Plan—Within four (4) years of the effective date of this Agreement, the States agree to develop and begin implementing a Watershed Improvement Plan (WIP) that will identify possible water-quality improvement strategies from point and nonpoint sources from each state including consideration of Clean Water Act (CWA) Section 319 Watershed Management Plans and development of a joint phosphorus index to be used by both states. The WIP will contain implementation action milestones necessary to achieve compliance with the Oklahoma total phosphorus criterion promulgated under Article II (1) and (2) of this Agreement. The WIP development and Advisory Workgroup activities shall include an opportunity for engagement with a broad group of participants including non-government organizations (NGOs) and interested stakeholders. If the established or necessary milestones for the WIP are not achieved by the earliest practicable time, the States acknowledge that they are required to proceed, either jointly or separately, with compliance under 40 CFR 130.7;

(A) Additional Considerations: In addition to the milestones mentioned above, the WIP shall also consider other recommendations including hydrologic alteration, riparian zone protection, stream bank stabilization, fluvial channel habitat, in-stream mining, and other contaminants. The WIP should also consider the impact of legacy phosphorus in the Watershed and its influence on the ability to meet the Oklahoma total phosphorus criterion.

(B) WIP Advisory Workgroup: The WIP shall have an Advisory Workgroup jointly chaired by representatives from the Oklahoma Conservation Commission (OCC) and ADEQ with membership consisting of representatives from OWRB, OCC, Oklahoma Department of Environmental Quality, ADEQ, ANRC, and Arkansas Department of Agriculture, or successor agencies.

(7) Steering Committee—The States agree to establish an Illinois River Watershed Steering Committee (“Steering Committee”) comprised of the Secretary or Director for each of the Parties. Additionally, the Parties will invite the Cherokee Nation to be a member of the Steering Committee and request that the EPA Region 6 Administrator designate an advisor to the Steering Committee. The Steering Committee shall oversee the implementation of this Agreement, including the MAW and the WIP Advisory Workgroup. The Steering Committee will meet at least on an annual basis to summarize progress in achieving the commitments set forth in this Agreement. Four affirmative votes by members of the Steering Committee are required for approval of decisions or any amendment to this Agreement.

(8) Data Sharing—The Parties agree to continue sharing all available reports of watershed improvements from public and private parties, compilations of environmental data and data summaries, and to make such data available to the Parties, stakeholders, and general public by providing increased access to each state’s data repositories. The Parties may develop a shared platform for distributing such data or pursue other tools that support transparency and information sharing in support of the commitments of this Agreement;

(9) Communications—Within three (3) months of the effective date of this Agreement, the States agree to develop and maintain a communications plan (including components such as electronic distribution of information and public meetings) to inform stakeholders and the general public on matters that impact the quality of the Scenic Rivers or are relevant to this Agreement;

(10) Amendment and Termination—The Parties agree to the following conditions:

(A) Amendment: This Agreement may be amended or modified by the Steering Committee in accordance with Article II (7). Any such amendment or modification must be in writing.

(B) Review: The Parties will review this Agreement five (5) years from the effective date and will recommend revisions as appropriate.

(C) Termination: The two Parties from each State may terminate this Agreement, on 90-days written notification, that includes a stated reason, provided to the other Parties at their respective addresses as specified in Article V (Signatures) below.

Article III

SUSPENSION OF ADMINISTRATIVE PROCESSES AND COVENANT NOT TO SUE

In consideration of the commitments by each party to this Agreement, the Parties agree to the following terms that are intended to avoid costly, time intensive, and distracting legal proceedings while preserving all Parties' legal rights.

Parties for both States will continue cooperative efforts to improve and protect water quality in the designated Scenic Rivers. The Parties for both States covenant and agree during the Term of this Agreement not to institute or maintain administrative enforcement actions, judicial proceedings, or to take regulatory actions that are against any other Party to this Agreement and are contrary to this Agreement.

The Parties reserve any and all rights, claims, or causes of action that presently exist or that may arise during the term of this Agreement related to the First Statement, the Second Statement, the Numeric Phosphorus Criterion, the criterion frequency, critical flow, and duration components and the WIP, which, as necessary, may be promulgated in a form pursuant to 40 CFR 130.7 (the Tolled Claims), but covenant and agree not to initiate any legal or administrative proceedings against any other party to this Agreement related to the Tolled Claims.

The Term of this Agreement shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the Parties to this Agreement relating to the Tolled Claims. Any defense of laches, estoppel, waiver or other similar equitable defense to the Tolled Claims based on the running or expiration of any time period shall not include the Term of this Agreement. The foregoing tolling agreement does not constitute an admission or acknowledgement of any fact, conclusion of law, or liability by any party to this Agreement. The foregoing tolling agreement does not constitute any admission or acknowledgement by any party that any statute of limitations, or similar defense concerning the timeliness of commencing a legal or administrative action, is applicable to the Tolled Claims. The Parties reserve the right to assert that no statute of limitations applies to any of the Tolled Claims and that no other defense based upon the timeliness of commencing a legal or administrative action is applicable.

Article IV

GENERAL PROVISIONS

Nothing in this Agreement creates any rights or causes of action for any person who is not a party to the Agreement.

This Agreement is not intended to affect any claims by or against a third party. However, if a third party initiates a legal or administrative proceeding related to water quality in the designated Scenic Rivers that is inconsistent with the terms of this Agreement, the Parties shall take necessary steps to indicate to inform the Court of their support for this document.

This Agreement is effective upon execution by the Parties and without the requirement of filing with any Court, and the Agreement may be signed in counterparts. The Effective Date of this

Agreement shall be the date of the last Party's signature. The Term of this Agreement shall be the period from the Effective Date to the date of termination.

Except as provided in this Agreement, this Agreement shall not impair any obligations, rights or remedies available to any Party under the First Statement or Second Statement, which shall remain binding in accordance with their terms.

This Agreement, together with any provisions of the First Statement and the Second Statement not superseded herein, contains the entire understanding between the Parties, and no statement, promise, or inducement made by any party that is not set forth in this Agreement, together with any provisions of the First Statement and Second Statement not superseded herein, shall be valid or binding, nor shall it be used in construing the terms of the Agreement for the implementation of the Joint Study Committee Recommendations.

Article V SIGNATURES

A. Key officials are essential to ensure maximum coordination and communications between the parties and the work being performed. They are:

1. For the Oklahoma Secretary of Energy and Environment

Secretary of Energy and Environment
204 N. Robinson Suite 1010
Oklahoma City, OK 73102

2. For the Oklahoma Department of Agriculture, Food, and Forestry

Secretary of Agriculture
2800 N. Lincoln Blvd.
Oklahoma City, OK 73105

3. For the Arkansas Department of Environmental Quality:

Director
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

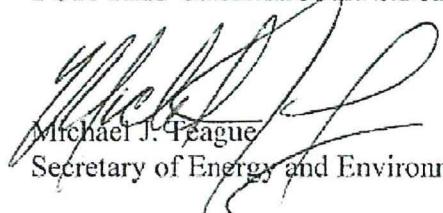
4. For the Arkansas Natural Resources Commission

Executive Director
Arkansas Natural Resources Commission
101 E Capitol Ave. #350
Little Rock, AR 72201

B. If there is a change in the identity of one of the key officials identified above, the affected party will provide the other party with written notice of the change within ten (10) days of the effective date thereof.

IN WITNESS HEREOF, the Parties hereto have executed this Agreement on the date(s) set forth below.

FOR THE OKLAHOMA SECRETARY OF ENERGY AND ENVIRONMENT:



Michael J. Teague
Secretary of Energy and Environment

13 Nov 2018

Date:

In witness thereof:

FOR THE OKLAHOMA SECRETARY OF AGRICULTURE:



Jim Reese
Secretary of Agriculture

13 Nov 2018

Date:

In witness thereof:

FOR THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY:



Becky Keogh
Director
Arkansas Department of Environmental Quality

Date: 14 November 2018

In witness thereof:

FOR THE ARKANSAS NATURAL RESOURCES COMMISSION:



Bruce Holland
Executive Director
Arkansas Natural Resources Commission

Date: 14 November 2018

In witness thereof: